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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 953

THE SANITARY DISTRICT OF CHICAGO,
Petitioner,

vs.

ACTIVATED SLUDGE, INC., et al,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Foreword.

This is respondent's brief in opposition to a petition for a writ of certiorari.

The Jones patents involved have been held valid and infringed by different trial courts in the Seventh Circuit and twice have been held valid and infringed by the Circuit Court of Appeals of the Seventh Circuit (*City of Milwaukee* v. *Activated Sludge*, 69 F. 2d 577; *Sanitary District of Chicago* v. *Activated Sludge, Inc., et al.*, 90 F. 2d 727). In the recent accounting proceedings, the trial court has given a judgment awarding respondents the sum of $950,000 (R. I, pp. 52-73*). The judgment for such amount

*For the purpose of uniformity, respondent follows the petitioner in indicating the Volume of the Printed Record by Roman numerals and in indicating the page of the Volume by arabic numerals.

has been affirmed by the Circuit Court of Appeals of the Seventh Circuit (R. I, p. 903).

The Jones patents in suit have long since expired and there is no conflict of opinion between Circuit Courts of Appeal.

This case has now been pending in the courts for more than twenty-two years. Litigation should terminate sometime, yet this litigation is hoary with age and is of ancient lineage. Counsel for petitioner have with unremitting persistence and unique thoroughness attacked the validity of the Jones patents and denied infringement thereof. Petitioner's answer asserted some 1671 separate defenses to the bill of complaint. These defenses were made the subject of 704 printed pages of argument by petitioner's counsel in the District Court in the instant case on the question of validity and infringement, and 1484 printed pages of argument (in the Milwaukee case and in this Chicago case) in the Court of Appeals. Petitioner's petition to vacate the decree of February 8, 1935 (R. XI, p. 5076) and to reopen the case was the subject of hundreds of additional printed pages of argument before the District Court and the Court of Appeals.

This petitioner for the third time attempts to interest your Honors in an adverse decision in an ordinary patent case in which there have been concurrent findings of fact by the lower courts. The case is well within the rule that such concurrent findings will not be disturbed when there is evidence to support them. *Thompson* v. *Ford Motor Co.*, 265 U.S. 445; *Goodyear* v. *Ray-O-Vac*, 321 U.S. 275; *The Williams Mfg. Co.* v. *United Shoe Machinery Co.*, 316 U.S. 364.

The petitioner, in effect, asks your Honors to ignore the salutary rule which was laid down at an early date in the interest of general public policy and to give to this litiga-

tion further attributes of immortality. As stated by Mr. Justice Story in *Ocean Insurance Co.* v. *Fields*, 2 Story 59; 18 Fed. Cas. 532:

> "It is for the public interest and policy to make an end to litigation or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal."

This is the Fourth Attempt to Obtain Certiorari in Litigation Involving the Jones Patents, Certiorari Having Already Been Refused on Three Other Occasions.

The original bill of complaint was filed on September 19, 1924 by Edgar C. Guthard and Activated Sludge, Ltd., a British corporation, as plaintiffs. At the time the original complaint was filed, Activated Sludge, Ltd., was the owner of the legal title to the patents in suit, all of which related to processes and apparatus for the treatment of sewage. Edgar C. Guthard was the holder of a somewhat limited exclusive license thereunder. On February 24, 1927, Activated Sludge, Ltd., the British corporation assigned all of the right, title and interest in and to the patents in suit, to the sole plaintiff, Activated Sludge, Inc., a corporation of Delaware, which was dissolved on November 24, 1941 and the assets of the corporation in the form of choses in action assigned to the stockholders pro-rata according to the number of shares held by them.

On January 25, 1928, Activated Sludge, Inc., filed in this cause, an original bill in the nature of a supplemental bill of complaint. It set forth the facts with respect to the transfer of title of the patents pending the suit. The District Court dismissed the original bill in the nature of a supplemental bill of complaint, one reason given being that there was pending against the original plaintiffs a counterclaim charging acts of harrassment by reason of infring-

ing notices and the like, which said original plaintiffs were alleged to have caused to be sent out. On appeal, the Seventh Circuit Court of Appeals reversed the order of the District Court of May 16, 1929, and held that the pleading filed by Activated Sludge, Inc., was a good pleading, and that the original plaintiffs, Edgar C. Guthard and Activated Sludge, Ltd., could be retained in the case as cross-defendants to the defendant's counterclaim, even though the new plaintiff, Activated Sludge, Inc., would be the only plaintiff upon the patent infringment claim.. These are some of the dilatory tactics pursued by petitioner which prevented "respondents" from completing their pleadings, as pointed out by petitioner (p. 10). The opinion of the Seventh Circuit Court of Appeals upon that appeal is reported in 33 F. 2d 452.

The First Petition for a Writ of Certiorari.

In the meantime, Activated Sludge, Inc., had filed a complaint against the City of Milwaukee, charging infringment of the patents which are here in suit. The defendant in that case was represented by the same counsel who then represented the present defendant, one of whom still represents the present defendant. The record is replete with evidence that the defendants in the two cases acted in full concert and with full knowledge of the proceedings and proofs in both cases.

The suit against the City of Milwaukee was first reached for trial. After a long trial and voluminous briefs, the District Judge on February 7, 1933, filed a 68 page printed opinion, which is not reported, finding the patents in suit to be valid and infringed, and holding that they were owned by the sole plaintiff, Activated Sludge, Inc., and granting the relief prayed. On appeal, the decree of the District Court with respect to the validity and infringement of the

patents in suit was affirmed by the Seventh Circuit Court of Appeals on March 2, 1934. The opinion of the Seventh Circuit Court of Appeals is reported in 69 F. 2d 577.

On July 9, 1934, the City of Milwaukee filed a petition for certiorari in this court, together with a supporting brief and the eight-volume record comprising 6,287 pages. That was No. 165 of the October term, A.D., 1933. Certiorari was denied on October 8, 1934, 293 U.S. 576.

The Second Petition for Writ of Certiorari.

The present case against the Sanitary District of Chicago was reached for trial on May 17, 1932, and was subsequently tried upon the original bill in the nature of a supplemental bill of complaint filed by Activated Sludge, Inc., and upon the counterclaim of defendant against Edgar C. Guthard and Activated Sludge, Ltd. On October 18, 1934, the District Court filed an opinion reported in 8 Fed. Supp. 329, and on February 8, 1935, entered a decree finding valid and infringed, the patents in suit, Nos. 1,247,540, 1,247,542, 1,282,587, 1,286,017, and Re. 15,140.

The decree also held that Activated Sludge, Inc., was the owner of the patents and of all rights thereunder. The decree also dismissed *finally** the counterclaim against Edgar C. Guthard and Activated Sludge, Ltd. No appeal was taken from this latter portion of the decree, and Edgar C. Guthard and Activated Sludge, Ltd., were finally dismissed from this suit, and have not been parties in any respect since February 8, 1935, even though petitioner insists upon including them in the title of this cause.

Upon an appeal to the Seventh Circuit Court of Appeals from so much of the decree as related to patent infringement, the decree of February 8, 1935 was affirmed in all re-

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* Emphasis ours throughout this brief except as noted.

spects, the court's opinion of June 16, 1937, being reported in 90 F. 2d 727.

On September 13, 1937, the defendant herein filed a petition for certiorari and supporting brief in this Court, No. 407 of the October term, 1937. At the same time, there was also filed a nine-volume record comprising 5,817 pages. Certiorari was refused on October 25, 1937, 302 U.S. 736.

The Third Petition for Writ of Certiorari.

As a basis for petitioner's second effort (third effort in the litigation involving the Jones patents) to get this patent infringement suit before the Supreme Court, counsel for the Sanitary District of Chicago concocted a motion for leave to file a petition to vacate the decree entered on February 8, 1935 and affirmed by the Seventh Circuit Court of Appeals on June 16, 1937, and to reopen the case for a further trial upon allegedly newly discovered evidence.

This motion was denied by the District Court. It was then made the subject matter of an appeal to the Seventh Circuit Court of Appeals. On March 27, 1941 the Seventh Circuit Court of Appeals affirmed the decision of the District Court in a short opinion adopting and approving the reasons given by his Honor, Judge Lindley, for denying the defendant's motion. Petitioner then filed a petition for certiorari in this Court which was denied on May 26, 1941, 313 U.S. 583.

This Fourth Petition for a Writ of Certiorari.

Defendant's present petition for certiorari is, therefore, the fourth attempt to have the subject matter of this case reviewed by the Supreme Court of the United States.

The present petition is based on:

(1) Alleged suppression and concealment of evidence

concerning Dilling's relation to this suit, the exact and identical premise on which the third petition for writ of certiorari was denied;

(2) That the final judgment on the accounting should be reversed because predicated on legal principles in conflict with the decisions of the Supreme Court and other circuits, and;

(3) Invalidity of the patents on which the final judgment is based, the identical subject matter of the first and second petitions for writ of certiorari denied by this Court.

In the present petition for certiorari, as well as in the earlier petitions, the contention has been made that it was a matter of great public importance and that in each case the Seventh Circuit Court of Appeals has ignored earlier opinions of this Court and decided questions of law differently than had other courts. In the briefs in opposition to said earlier petitions, it was shown that these contentions were quite contrary to the facts and were without support.

The fact is, that this case is of no importance to anyone but the parties hereto. All of the patents herein have long since expired, and there is no suit pending, or possible, against any other party alleging infringement of those patents.

The fact is, that the decisions in this case by the District Court, and the affirming decisions by the Seventh Circuit Court of Appeals, which are sought to be reviewed, do not involve any conflict or dispute whatsoever with any decisions or rules of law laid down by this Court or any Circuit Court of Appeals.

The fact is that defendant's contentions, now presented in its petition, were all decided against defendant, both in the District Court and by the Circuit Court of Appeals solely upon factual questions and not at all upon any controverted legal principles.

The entire dispute which defendant seeks to present to this Court is a factual dispute. It does not involve a single disputed question of law. Like the three earlier attempts for certiorari, this present attempt to prolong this twenty-two year old litigation should likewise be denied.

This is nothing more than an ordinary patent case in which a defeated litigant is asking your Honors to give it another hearing, to determine, with respect to each of several patents, the usual factual issues of invention, originality, breadth of claims and infringement, all of which factual issues have been found in favor of respondent by the District Court and by the Circuit Court of Appeals.

As the Supreme Court has said:

> " . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. The present case certainly comes under neither head." *Layne & Bowler Corporation* v. *Western Well Works,* 261 U. S. 387.

The first sentence in that opinion is "This is an ordinary patent case."

In *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163, this Court again reiterated the above stated limitations upon the issue of writs of certiorari as follows:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated

party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

In Answer to Petitioner's Argument — Point I.

As it did in its second attempt to obtain certiorari, petitioner again urges that the District Court and the Circuit Court of Appeals flagrantly disregarded various well established principles of law in denying its motion for leave to file the petition to vacate the decree and reopen the case and that the said denial was without hearing any evidence.

The fact is that the records of the trials of the Milwaukee litigation and the Chicago litigation, in which the defendants were represented by the same counselors, occupied more than eighteen thousand pages of printed matter. The plaintiff's main reliance in opposition to defendant's motion for leave to file its petition to vacate and reopen was the trial records comprising these eighteen thousand pages. As shown at page 105 of the Record, Volume II, the respondent long in advance of the hearing upon the defendant's motion for leave to file its petition to vacate and reopen, gave notice that it would rely upon and refer to these eighteen thousand pages of trial record and the briefs in the Milwaukee and Chicago litigations. These trial records and briefs were available to the District Court and were available to the Court of Appeals.

As a matter fact, the plaintiff's main reliance in opposition to the defendant's motion for leave to file its petition to reopen, was the trial records and the briefs in the Milwaukee and Chicago litigations. The reason for this was that the trial records and briefs in these cases so completely answered the allegations upon which the defendant based its motion for leave to file its petition to reopen. It was

these trial records and the briefs in these cases upon which plaintiff has heretofore relied in opposition to, and upon which the District Court and the Court of Appeals have relied in denying the defendant's motion for leave to file its petition to vacate and reopen.

That the contentions and assertions made in petitioner's petition to vacate and reopen, as well as in petitioner's present petition, are completely disproved by the contents of the record in this cause and in the earlier litigations, without the introduction of any new evidence or testimony, is thoroughly well known to this petitioner. The fact that these assertions were completely disproved in the records in the prior litigations is well known to the Circuit Court of Appeals for the Seventh Circuit. There was never any additional testimony taken in the District Court to disprove the assertions and contentions made in the petitioner's petition. The fact is that the District Court did hear voluminous evidence in opposition to petitioner's petition, but that the voluminous evidence had been heard and received many years earlier. Petitioner has not been deprived of its day in court with respect to any of the issues raised in its former petition to vacate and reopen the decree of February 8, 1935. Petitioner again presents the same issues to this Court, asking in effect for a rehearing of the petition for writ of certiorari directed to the same alleged errors which have already, on a previous occasion, been denied by this Court.

As appears at page 5 of the petition, and elsewhere throughout the petition and brief, petitioner, in an attempt at legalistic shadow-boxing alleges further grievance because of the order entered herein (R. I, p. 35), striking paragraph 4 of defendant's petition, filed June 18, 1945. The subject matter of paragraph 4 conforms identically in substance to the petition previously filed by petitioner to va-

cate the decree of February 8, 1935 (R. XI, p. 5076) and reopen the case for further proceedings.

In the unreported opinion of the District Court, it was stated:

> "Now, again, we have a petition which seeks to introduce evidence of the same transactions that were sought to be reviewed in the petition of 1940. Gentlemen, *I can see nothing in this except an ingenious attempt to relitigate the very questions which were presented in that petition.*"

In that same opinion, Judge Lindley further characterized petitioner's tactics as follows:

> "I have read the briefs of the parties and have listened to arguments of counsel. I say, frankly, if it were not for the high character of counsel for defendant, I would be inclined to think they were playing with the court. * * * *This all strikes me very much as a lot to do about nothing.*"

This language was used by the same trial judge who in 1940 again reviewed the evidence in this case, heard lengthy oral arguments by counsel, and read hundreds of pages of briefs, all pertaining to petitioner's right to file its petition to vacate and reopen. Petitioner's stratagem in its petition on the accounting is too obviously "much to do about nothing." In the interest of being done with this litigation, Judge Lindley denied petitioner the right to take evidence upon issues (the subject matter of paragraph 4) that had already been disposed of in this case on the first petition.

The record clearly shows that the subject matter of paragraph 4 is merely repetitious of that material contained in the first petition. As stated by the trial court (R. III, p. 888):

> "The fact as to his (Dilling's) interest has, it is alleged, only recently come to defendant's attention, for

> the reason that at no time was it disclosed but was rather in fact suppressed by plaintiff."

The trial court in its opinion continued as follows (R. III, p. 897):

> "I cannot attribute fraud to plaintiff in concealing the alleged interest of Dilling for apparently plaintiff and Dilling's former associates have at all times earnestly insisted that he had no interest, and apparently considered his interest wiped out. With the title to the patents reassigned, I cannot attribute fraud to plaintiff in failing to volunteer to the court that Dilling had at one time claimed to have an interest or in failing to say that they anticipated that he might thereafter claim an interest."

We content ourselves, therefore, with the legal aspects of the first petition in connection with which the District Judge reviewed and considered voluminous evidence before denying petitioner the right to file the same.

Petitioner would like to impress upon your Honors that the allegations set forth in the said petition must be taken as true for the purpose of reviewing the decision of the court below. There are many reasons for maintaining, as we do, that Judge Lindley neither treated the facts alleged in the defendant's petition as true nor was warranted in accepting the factual allegations of the defendant's petition as true.

One of the reasons for our view is that the law would not have permitted Judge Lindley to accept the facts in the petition as true, despite convincing evidence to the contrary.

The second reason is that the order with which Judge Lindley concluded his first opinion in 1940 (R. III, p. 899), was a denial of the defendant's motion for leave to file its petition. It was not the grant or denial of any motion by

plaintiff to dismiss or to strike the petition as would have been the case if the matter had been treated in the manner claimed by the petitioner.

The third reason which contradicts the petitioner's intimations in this regard is the memorandum opinion of Judge Lindley (R. III, pp. 885, 899) from which it is clear that Judge Lindley gathered and garnered, not from the defendant's petition, but from the records of the prior litigations, innumerable facts and circumstances with which he contradicted or explained away the factual allegations of defendant's petition to vacate and reopen.

In his first opinion in 1940 (R. III, p. 885), Judge Lindley said:

> "The court has had complete access and recourse to the documentary and parol testimony contained in the voluminous record of the cause."

When, therefore, Judge Lindley said in said first opinion (R. III, p. 885) that:

> "The issue presented is the same as if the petition had been filed and its sufficiency were attacked by motion to strike or dismiss"

he meant, and he could have meant only, that the parties had been heard upon the merits of the matters which constituted the subject matter of the petition to vacate and reopen, and that any issues raised by the petition could be decided by recourse to the voluminous record of the cause.

The reason for referring to this matter at the outset of this brief is to say to this Court, as was said to the Court of Appeals, that it is not bound, as neither the Court of Appeals nor the District Court were bound, to confine itself to the allegations of the defendant's petition. No court, upon such a petition to vacate or reopen, as is now sought to be submitted to this Court, is bound to accept its factual allegations for the purpose simply of testing the sufficiency of those allegations, as upon a demurrer or a motion to dismiss a bill of complaint.

The Purely Factual Character of Every Question and Contention — Point I.

The controversy which defendant is attempting to present to this Court under Point I of the petition and argument is a factual dispute which the District Court and the Circuit Court of Appeals in concurrent findings has resolved in favor of the plaintiff and against defendant. The record proves conclusively that the petitioner's contentions are without foundation in fact as is evident from the following consideration of the main charges made by the petitioner.

(1) The essential grievance bearing the caption for petitioner's Argument, Point I is that:

> "Respondents should be barred from monetary recovery in this case on account of their sullied conduct in suppressing and concealing from petitioner and the courts the evidence concerning Dilling's relation to this suit, and it makes no difference how such evidence, had it been known to and introduced by petitioner during the trial, might have affected the result."

The conclusive answer to the primary argument made in petitioner's brief is that the District Court and the Circuit Court of Appeals for the Seventh Circuit have found from the records that the respondents have not been guilty of "sullied conduct" and that evidence has not been suppressed or concealed by the respondents, or from petitioner or the courts.

In presenting its argument with respect to the Keystone Driller (290 U.S. 240), Hazel-Atlas (322 U. S. 238), and Precision Instrument (324 U. S. 806) cases, the petitioner assumes that the respondents have been guilty of suppressing and concealing evidence. However, the District Court and the Court of Appeals have both found the facts to be contrary thereto. If the courts have

been right in their determination of the facts then the principle of those cases cannot be applicable to this case, in which there has been no suppression or concealment of evidence, as concurrently found by the courts.

(2) The petitioner alleges (p. 5) that:

> "These facts reveal that this suit was instigated by Albert W. Dilling, who was Chief Engineer of petitioner from December 16, 1920 to July 21, 1922,"

and that (p. 6):

> "While employed by petitioner, Dilling corresponded with the English owners of the patents in suit and for the first time became aware of the vulnerability of petitioner to litigation involving said patents in suit (R. II, 266, 270-3) and thereafter initiated the course of reprehensible conduct briefly described in this petition and more fully set forth in the brief attached hereto."

The conclusive answer to that contention of petitioner is that the District Court and the Court of Appeals for the Seventh Circuit have both found from the records available to them that this suit was not instigated and prosecuted by Albert W. Dilling. While the petition does not directly assert, petitioner's argument (p. 37) is predicated upon the assumption that petitioner's plans to build extensive sewage treatment works became known in some confidential manner to Mr. Dilling while he was in its employ and that what he did after the termination of his employment with petitioner, constitutes a breach of his fiduciary relationship with petitioner. The record shows (R. V, pp. 1076-1081) and the District Court and the Court of Appeals both found therefrom (R. III, pp. 895, 896, 920) that those general plans had been adopted and had been given wide publicity and were made available to the public many years earlier, and that Dilling took nothing belong-

ing to his former employer except knowledge of the infringement, which was in no wise confidential.

In presenting its argument with respect to the cases of *Trice* v. *Comstock,* 121 Fed. 620 and *Meinhard* v. *Salmon,* 249 N.Y. 458, petitioner assumes (contrary to the concurrent findings of the lower courts) the disclosure of confidential information made to Dilling during his employment and a breach of his fiduciary relationship to petitioner on termination thereof. If the courts were right in their concurrent findings of fact then these cases have no applicability in this case in which there has been no breach of fiduciary relationship as alleged.

In accordance with counsels' usual dexterity in the use of innuendoes to serve their own purpose, the inference most assuredly would be gleaned from petitioner's reference to correspondence between Dilling and the once English owners of the patents in suit while employed by petitioner (which might be assumed to be of extended and voluminous character from all that which is set forth in the petition and argument) that Dilling is chargeable with a breach of fiduciary relationship to petitioner at that time.

The fact is, that on September 26, 1918 (R. II, p. 266), the Sanitary District published a report on industrial wastes from the Stockyards and Packingtown District of Chicago, based on certain tests which were made at the activated sludge testing plant located at that place. The record (R. III, p. 462) shows that on September 26, 1918, the supply of the same report on stockyard trade wastes previously published, had been exhausted and the Board ordered 2,000 additional copies to be printed. This is the important report which defendant's counsel have heretofore urged, and again assert, formed the basis of Dilling's correspondence with Activated Sludge, Ltd. while employed by petitioner, but which the record (R. II, p. 266) actually shows was written by a person having the initials L.P., who

is no other than defendant's present and then Sanitary Engineer, Mr. Langdon Pearse. This document was so secret and confidential that the District printed and distributed two editions of thousands of copies of it!

(3) The petition alleges (pp. 7, 8) and the argument is premised on the erroneous assumption that petitioner's witnesses Guthard and Mayo testified falsely at the trial. The record shows (R. II, pp. 347-350) and the District Court and the Circuit Court of Appeals have both found therefrom (R. III, pp. 899, 920) that these witnesses did not give false testimony. The District Court said (R. III, p. 899):

> "I do not find that the witnesses Mayo and Guthard gave false testimony. Their testimony related to events occurring a number of years before the time when they testified. They were somewhat uncertain but I find nothing intentionally false. Clearly, they testified to nothing that would justify a rehearing."

The testimony referred to was given in 1932 concerning agreements entered into in the years 1923 and 1924.

(4) The petition (p. 6) infers that Dilling, as chief engineer of petitioner, was somehow responsible for the two relatively small plants (Des Plaines and Calumet) found to infringe the patents in suit.

The petitioner states (p. 34) that:

> " * * * an employee cannot after his employment ceases, as Dilling did here, take advantage of the information acquired by him during his employment to prevent his former employer from accomplishing certain of the purposes of their relationship."

The record shows (R. III, pp. 437-439 and exhibits cited) and the District Court and the Court of Appeals both found therefrom (R. III, pp. 892, 893, 920) that the said infringing plants were designed and/or under construction prior to Dilling's connection with the petitioner.

(5) The petitioner asserts (p. 6) that upon Dilling's recommendation the Activated Sludge process was adopted for petitioner's infringing North Side plant. The record shows (R. VI, pp. 1583-1584) and the District Court and the Court of Appeals both found therefrom (R. III, pp. 893, 920) that the North Side plant was designed and recommended by an independent commission of engineers selected for that purpose, and which did not include Dilling.

With respect to the contentions referred to above in paragraphs 4 and 5, the District Court stated (R. III, pp. 897, 898):

> "When Dilling entered the District's employment the latter had already committed the infringement at Des Plaines and Calumet. Nothing that it or anybody else could do thereafter could alter the fact. After his retirement, the District committed the third act of infringement in the North Side plant, but nothing that anybody might do could change the fact of that infringement, after it had once been committed."

(6) The petition asserts (p. 5) that:

> "Dilling's relationship to and interest in this case have been carefully concealed * * * and was discovered by petitioner only as a result of litigation instituted by Dilling against his co-adventurers. * * *"

In consonance with that part of the record (R. I, pp. 18-20) referred to by petitioner, the contention is to the effect that Dilling's interest did not become known to petitioner in any respect until March, 1939. The petition to vacate the decree of February 8, 1935, however, was not filed until January 27, 1940 (Rec. II, p. 2). The record shows (R. II, pp. 350, 351, 371) and the District Court and the Court of Appeals both found therefrom (R. III, pp. 888, 889, 920), that Dilling's claim to an interest had been a matter of public record for many years prior to the filing of the petition of January 27, 1940, and that defendant had had express

written notice thereof on January 7, 1936, nearly four years before defendant's said petition alleging "newly discovered evidence" was presented, and again on July 7, 1938, a year and a half before defendant's said petition was presented.

(7) While petitioner asserts (p. 34) that the question of title is not urged herein, nevertheless, the corner-stone of the fabricated concoction, better known as the alleged "sullied and corrupt conduct of respondents in conspiring to conceal and suppress Dilling's interest herein" which the defendant is attempting again to serve up to your Honors for a second consideration, revolves around the contention (p. 26) that the:

> "Massachusetts Trust, called Activated Sludge Processes of America, should have filed this suit."

and the alleged fact that (p. 26):

> "• • • all their• right, title and interest, legal and equitable"

in "the so-called license agreement" was assigned to the Massachusetts Trust and that "all knowledge of the Massachusetts Trust and the assignment of the patents to it" were:

> " • • • carefully, conspiratorially and effectually suppressed and concealed from the petitioner and the court substantially throughout this litigation."

The record shows (R. II, pp. 358-369) and the District Court and the Court of Appeals both found therefrom, (R. III, pp. 899, 920) that the argument that plaintiff (Activated Sludge, Inc.) did not have good title to the patents in suit could have been made at the trial and in fact the same counsel made precisely the same argument relative to

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• Dilling, Guthard, Mayo and McCaleb.

title in precisely the same language in a brief filed in the Milwaukee litigation more than two years earlier. The record (R. II, p. 355) further shows, and the District Court and the Court of Appeals found therefrom (R. III, pp. 887, 920), that the argument that the Guthard license was, in fact, an assignment and had never been effectively reassigned, had been raised by the then counsel for defendant in 1929 in the Milwaukee litigation and had made written notations thereof which appear in the record (R. II, p. 355) but had discarded the inquiry at that time as not worth pursuing.

How can it possibly be said that the matters respecting alleged defect in title were concealed from the petitioner and courts when the fact is that they were actually referred to but not followed up for the sole reason that petitioner's counsel was not sufficiently interested to do so.

As Mr. Justice Swayne expressed the rule in *Wood* v. *Carpenter,* 101 U.S. 135:

> "The means of knowledge are the same thing in effect as knowledge itself."

In approving the same rule in *Kinder* v. *Scharff,* 231 U.S. 517, Mr. Justice Holmes said:

> "During the pendency of the original proceeding the trustee suspected the alleged fraud, made some inquiries, but dropped the matter because he thought it was not worth while; that is, that it would not pay to go farther. He 'voluntarily abstained from availing himself of the means put in his hand by the law itself for the ascertainment of a suspected fact.' "

(8) In a further attempt to convince this Court of a dark and sinister plot perpetrated upon the petitioner and the courts, the petitioner makes reference to an alleged mis-quotation in a *brief* filed in the Milwaukee case. Such coloring to the alleged scheme perpetrated by respondents

was considered so trifling and piffling, even though argued at great length, both in brief and on oral argument, that neither the District Court nor the Court of Appeals thought it worthy enough of even a comment in their decisions with respect to defendant's petition to vacate.

(9) The climactic argument of petitioner's brief in its attempt to stigmatize respondent's former attorneys as having been possessed of evil designs in promulgating, maintaining and perpetuating the alleged ill-conceived plot to deprive the wrong-doing and infringing defendant of some legal right and practicing such fraud and suppression upon the lower courts, terminates with the further assertion (p. 33) that said attorneys were guilty of suppressing and concealing from petitioner, evidence in the Dilling case in 1939. The record (R. II, pp. 409-413) is clear that such contention is unfounded. The District Court and the Court of Appeals both found that there was no suppression of evidence in this case. While pages and pages were devoted in the briefs, and lengthy arguments were presented to the lower courts on this assertion, both courts have, like the contention referred to above in paragraph 8, considered the same to be of so trifling and of such an absurd character, that specific comment was deemed unnecessary.

The fact of the matter is that on March 17, 1939 a petition was presented by the defendant herein to Judge Barnes in the Dilling case, in which case the defendant herein was never at any time a party. The fact is that plaintiffs' (herein) only objection at that time was to the defendant's making motions and asking for the entering of orders in a suit to which it was not a party, the objections thereon being sustained by Judge Barnes and Judge Sullivan. The fact that there was never any attempt on the part of counsel for plaintiff to prevent defendant from inspecting or securing copies of the records in the Dilling suit is apparent from the comments made by plaintiffs' counsel during the argu-

ment before Judge Barnes in opposition to the petition filed by the defendant herein. It was therein stated (R. II, p. 411):

> "It is a little difficult to know what they want, but if there are some documents or papers to which they are entitled upon the question of title,—which has been decided all the way up to the denial of the writ of certiorari in the Supreme Court,—why they can go next door into the court where that case is pending and move for that discovery before the judge that knows all about it, and it seems to me something of an imposition to * * * come in here and ask the court to grant this petition, * * * "

The defendant was told to make its motions "in its own suit" (R. II, p. 412) where plaintiffs would have made no objections whatsoever. The order entered in the Dilling case on June 30, 1939 returned the exhibits in the customary way to the respective counsel in that case, but there was never any order that such documents should be destroyed, and they have never been destroyed. The transcript of testimony taken in the Dilling case was never ordered destroyed, and it has never been destroyed. The Master's report existing at that time was not a full or complete final draft report, but was admittedly a preliminary draft, conceded by everyone to be inaccurate and incomplete in many respects.

The foregoing are the principal assertions made by petitioners on which it bases its appeal to this Court to grant writ of certiorari. All of these assertions are shown conclusively by the record to be wholly unfounded. They demonstrate beyond a peradventure of doubt that the questions which petitioner would like this Court to review by certiorari are, in fact, all factual questions which have been uniformly decided contrary to petitioner's assertions.

As said by this Court in the case of *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14:

"But both courts found that the United States failed to establish any conspiracy, fraud, or deception alleged. Findings of fact, concurred in by two lower courts will not be disturbed unless clearly erroneous. *Washington Sec.* v. *United States*, 234 U.S. 76, 78. Under this rule the findings must be accepted."

In Answer to Petitioner's Argument — Point II-A.

Petitioner, having failed heretofore in interesting this Court in reviewing the identical subject matter of Petitioner's Argument, Point I (Certiorari denied, 313 U.S. 583) and the identical subject matter of Petitioner's Argument, Point III on two other separate occasions (Certiorari denied, 293 U. S. 576; 302 U. S. 736), now attempts to inject life-blood into the present petition for writ of certiorari, by picayunishly criticizing the lower courts' strict adherence to the authorities in sifting and weighing the evidence in arriving at the money judgment below which was specifically referred to as being conservative in view of the fact that the petitioner is a public body and that judgment against it can be satisfied only from the revenues which it collects from its inhabitant tax-payers.

The alleged assignment of error relates to facts concurred in by both the District Court and the Court of Appeals and not to any conflict in decisions or a failure of the lower courts to adhere to and follow the statutes and decisions of this Court with respect to the assessment of damages.

In its opinion (R. I, p. 70) the District Court stated:

"I have thought it proper also to avoid award of exemplary or punitive damages and to confine recovery to actual compensation to the plaintiffs for that of which they have been deprived during the life of the patents and during the periods of infringement,—in other words, actual compensatory damages."

The Statute (35 U.S.C.A., Section 70) under which the case was tried on the accounting, provides that:

> " * * * the court may adjudge and decree the payment by the defendant to the complainant of a *reasonable sum as* profits or *general damages* for the infringement."

The fact is that the District Court entered judgment for a reasonable sum as general damages for defendant's infringement of the Jones patents. While the petitioner would like to impress this Court with the thought that the judgment should be separated and segregated into certain component parts, nevertheless, the statute makes no such requirement and the cases specifically applicable to the point in question clearly point out that the court, in assessing damages, is under no obligation to follow any particular method or use any particular base in arriving at its ultimate award. *United States Frumentum Co.* v. *Lauhoff, et al,* 216 Fed. 610, 617 (cited and approved by this Court 235 U. S. 641, 650; 266 U. S. 342, 352; 289 U. S. 689, 698); *Motor Player Corporation* v. *Piano Motors Corporation,* 19 F. 2d 993, 996.

In arriving at the award in this case, the District Court took into account, the character of the inventions, their utility, their practicability, their popularity, their demand, the extent and value of their use, and the advantages, including savings, which were made by petitioner because of its infringing acts, as well as the fact that petitioner was a persistent and deliberate infringer and that there has been long and expensive litigation. Petitioner urges error because of the failure of the District Court to segregate and separate those elements of damage awarded plaintiffs because of the long and expensive litigation and the persistent and deliberate infringement by petitioner and any interest involved because of the long delay in payment of monies due plaintiffs.

Such factors and elements have long been considered by the lower courts and approved by this Court as appropriate in determining a reasonable sum as general damages. *Overman Cushion Tire Co., Inc.* v. *Goodyear Tire & Rubber Co.*, 66 F. 2d 361 (C.C.A. 2) (Certiorari denied 290 U.S. 681); *John B. Stetson Co.* v. *Stephen L. Stetson*, 58 F. S. 586 (Affirmed 85 F. 2d 586, C.C.A. 2; Certiorari denied 299 U.S. 605); *Swan Carburator Co.* v. *Nash Motors Co.*, 133 F. 2d 562, C.C.A. 4 (Certiorari denied 320 U.S. 762; Rehearing denied 320 U.S. 812).

Nor can error be validly asserted when interest is taken into account where there are exceptional circumstances justifying its inclusion. As stated by this Court in *Duplate Corp.*, v. *Tri-Plex Safety Glass Co.*, 298 U.S. 448, at page 459, after setting forth the general rule with respect to the running of interest where damages are assessed on the basis of a reasonable royalty "There are no exceptional circumstances justifying a departure from what is at least the general rule."

In the case of *John B. Stetson* and *Swan Carburetor Company* cases above cited, as well as in the case of *Mathey* v. *United Shoe Machinery Co.*, 54 F. S. 694, after referring to the authoritative decision in the *Duplate Corp.* case, the courts assessed interest as part of the damages on the basis of deliberate infringement of the patents involved. It is not at all surprising that in the present case, the District Court and the Circuit Court of Appeals were able to find exceptional circumstances which would permit of the inclusion of interest as a factor in determining the reasonable sum entered as general damages in this case.

Petitioner further complains about the judgment entered herein and says that (p. 41):

> "The 'elusive' damages which the court below held that 'plaintiffs ought to recover' for what they 'actually lost' *are not defined by the court below.*"

A complete answer to that is found in the opinion of the District Court wherein it was stated (Rec. I, pp. 63, 64):

> "In view of defendant's public character, its statutory function and the one purpose of its existence, efficient, adequate disposition of sewage with elimination or avoidance of public nuisances, certain gains or advantages arising from adoption and utilization of the activated sludge processes are significant and important in any consideration of factors entering into disposition of the question of compensation to plaintiffs. These advantages include freedom from noxious odors, putrid streams, pestilential flies. As a result, defendant achieved freedom from suits for maintaining nuisances and enjoyed the privilege of maintaining its boasted efficient plant on a comparatively small tract of land, adjacent to rapidly expanding residential districts, free of annoyance to the inhabitants. *These are substantial and, in all fairness, though difficult of exact monetary valuations and elusive in character, in so far as yardsticks of measurement are concerned, must, of necessity, in order to do equity and supply legal compensation, be given consideration as factors essentially involved in such a proceeding as this.*"

Thus the lower courts followed and applied the rule set forth by Judge Denison, and oft approved by this Court, in the case of *United States Frumentum Co.* v. *Lauhoff*, 216 Fed. 610, wherein it was stated (p. 616):

> " • • • Proof of market value is one way to show this actual loss; proof of lost sales is another way. But, if neither of these methods can be followed the law permits other available, pertinent proofs. Those familiar with real estate estimate and testify to the real value or fair value of land which is without market value (*Chicago, etc. Ry* v. *Ohio Co.* (CCA 6) 214 Fed. 751, —CCA—); and these witnesses and the jury may take into account all the special circumstances of the situation as bearing on the ultimate question. The same thing is true as to personal property of such

character that it has no market value. Instances of the application of this rule as to both real and personal property are too familiar for citation. *In the same general class are all personal injury cases. Pain and suffering, the loss of earning power, the loss of support, are all things which have no market value and all present situations where the damages cannot be ascertained or computed according to any arithmetical formula; but the jury is put in possession of all the facts and circumstances, it has the benefit of such testimony from experts as may show the rules and methods in force in the particular field, and it estimates, as best it may, how much money will compensate plaintiff for the wrong done.*"

Again at page 617:

"• • • More or less of these things may appear in a given case, all having a bearing on the real value of that for which plaintiff is to be compensated, and the case presents no greater difficulty in computing and ascertaining damages than is met by a hundred juries every day."

Nor is there any delay chargeable to respondents as alleged by petitioner (p 10). In an attempt to convince the lower court that petitioner was not guilty of delay the following colloquy between counsel clearly shows that petioner admits that respondents are not responsible for any delay. (R. I, p. 484):

"By Mr. Byron: Are you attempting to base an argument of laches on this. I just want to know if that is the purpose?

By Mr. Snyder: We are not charging laches against you, but we are explaining we are not guilty of any delay."

In Answer to Petitioner's Argument — Point II-B.

We invite this Court to review the trial court's opinion and findings of fact (R. I, pp. 36-71) concurred in and

adopted by the Court of Appeals. We submit that it will not find the alleged violation of the Rules of Civil Procedure and the alleged failure to follow the decisions of this Court, as now urged by petitioner. This Court in the case of *Kelley et al.* v. *Everglades Drainage District,* 319 U.S. 415, has recognized the special character of each litigated case, and therein states (p. 419):

> "The nature and degree of exactness of the findings required depends on the circumstances of the particular case."

The District Court conformed to the particular requirements of the present case in its findings of fact and in its opinion and conformed to the Rules of Civil Procedure. The necessity for itemizing the infringer's profits, the profit on plaintiff's lost sales because of the infringement, the reasonable royalty applicable to certain of the infringing installations and plaintiff's loss due to a reduced selling price because of infringment in order to arrive at the total award found in the case *of Power Specialty Co.* v. *Connecticut Light and Power Co. et al,* 80 F. 2d 874 (Petitioner's Brief, p. 44) finds no counterpart in the present case by virtue of the fact that a *reasonable sum* was assessed *as general damages* under the statute herein.

In Answer to Petitioner's Argument — Point II-C.

The gravamen of petitioner's argument in this section of its brief is that there is no tangible evidence on which the concurrent findings of the lower courts are based. But few elements of the law of damages have been reviewed more often by this Court than that pertaining to the weight and sufficiency of evidence required in establishing the amount of damages. In the case of *Eastman Kodak Company of New York* v. *Southern Photo Materials Company,* 273 U.S. 359, Justice Sanford quoted from the opinion of the Court of Appeals as follows (p. 379):

> "' • • • Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.' "

and stated:

> "This, we think, was a correct statement of the applicable rules of law."

This rule of law as to the sufficiency of evidence with respect to damages has been followed consistently by this Court in the case of *Palmer et al, Trustees,* v. *Connecticut Railway & Lighting Co.,* 311 U. S. 544, *Story Parchment Company* v. *Patterson Parchment Paper Company et al,* 282 U. S. 555 and *Bigelow et al* v. *R.K.O. Radio Pictures Inc., et al,* 327 U. S. 251, and others.

Petitioner, in total disregard for the facts, and with an obvious attempt to mislead this Court, complains that the judgment is unsupported by any competent evidence in the record.

The District Court found otherwise, and the Circuit Court of Appeals concurred in the findings of the District Court.

The fact of the matter is that respondents found it unnecessary to offer any opinion testimony for the reason that the extent to which plaintiffs had been damaged could be readily ascertained from documentary evidence emanating from petitioner. The conclusiveness of such evidence is established by the record.

As stated by the District Court (R. I. p. 61):

> "*I conclude from what I have enumerated and other facts and circumstances in this record that there can be no question as to the sufficiency of the evidence to sustain findings of unusual utility, of efficient practicability, of undisputed advantages.* All of such facts

must enter into the determination by this court of what is just compensation for invasion of plaintiff's rights."

And again (R. I., p. 62):

"It is extremely difficult for one to determine definitely what the exact monetary savings to defendant, arising from its adoption and use of infringing apparatus and processes, was, *but one must inevitably find that the monetary savings were tremendous.* The exact amount is unimportant, for savings as such, are not the monetary yardstick of defendant's liability."

The District Court in assessing damages rejected defendant's theory that the unaccepted offers and the testimony of expert witnesses should prevail as a criterion of the extent of damages sustained by plaintiff by defendant's infringing acts. Such evidence was taken into account but was not given decisive weight (R. I, p. 66), the judgment being predicated primarily on the benefits derived by petitioner by practicing the Jones inventions (held by the lower courts to be of pioneer and meritorious character and of revolutionary benefit to mankind) and particularly the value for use of the inventions by the said petitioner. The evaluation of the patents for use was in strict accordance with this Court's authorative decision in the case of *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 698, 699.

Mr. Justice Cardozo, in rendering the opinion for this Court, after referring to the leading cases of *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641, *Suffolk Co.* v. *Hayden*, 3 Wall. 315, and *U. S. Frumentum Co.* v. *Lauhoff*, 216 Fed. 610, and after pronouncing that the rule of law was applicable in actions in tort, stated (p. 699):

"Value for exchange is not the only value known to the law of damages. There are times when heed must be given to value for use, if reparation is to be adequate."

The conservativeness of the award, based on the evaluation of such benefits to defendant, is evident by the fact that the defendant, in its cost of construction and operation of the infringing plants made savings amounting to $12,900,00 as shown by the evidence, and that the savings in land alone for the North Side Sewage Treatment Works on a conservative basis amounted to $2,445,567 (R. I 440, 441, 524, Plfs. Ex. A-10).

As this Court has many times said, a writ of certiorari will not be granted to review evidence and discuss specific facts (*U. S.* v. *Johnson*, 268 U. S. 220; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175; *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314). The present petition merely asks this Court for a rehearing on evidentiary facts which were resolved in favor of respondents and against petitioner by the lower courts.

In Answer to Petitioner's Argument—Point III.

In introducing the subject matter of this section of petitioner's brief, counsel for petitioner urge upon this Court (p. 52) that:

> "In addition to the other reasons for the exercise by this Court of its supervisory jurisdiction, it can be readily shown that the patents themselves are invalid. This can be done without reviewing or weighing the evidence but simply by perusing the opinions of the court below."

Equivalent assertions appear elsewhere throughout the petition and brief.

Considering the length of time in which the Jones patents have been involved in litigation and the unusually large record and number of documentary exhibits bearing upon, and devoted to, the usual factual issues of invention, originality, scope of claims, infringement, etc., and the unusually large amount of time which the lower courts of

necessity were required to spend in a review of this accumulated record, the proposal presented to your Honors that invalidity of the patents could be readily determined simply and merely "by perusing the opinions of the court below" is not only novel but absurd.

In short, the petitioner invites this Court to disregard the well-established rules so often expressed by it, to cast aside all of the work that the lower courts have accomplished during the last twenty-two years, and by simply "perusing the opinions of the court below," to grant to petitioner a new hearing before this Court on questions which are purely questions of fact. These questions of fact have been decided against petitioner and the patents have been sustained as valid.

And again, as a general proposition, in its proposal to this Court, petitioner (p. 52) states that:

> "The patents in suit have not been considered anywhere except in the Seventh Circuit. * * * There consequently exist in this case the same grounds for granting certiorari as existed in other cases in which this Court granted certiorari because of the improbability of there ever arising a conflict of decision between the circuits."

The petitioner knowingly attempts to mislead this Court in asserting that the patents in suit have not been considered anywhere except in the Seventh Circuit. The five patents in suit have been involved in five law suits* and

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* Activated Sludge, Inc. et al v. Sanitary District of Chicago.
Activated Sludge, Inc. v. City of Milwaukee.
Activated Sludge, Inc. v. Sewerage Commission of the City of Milwaukee.
Activated Sludge, Inc. v. City of Waco, Texas.
Activated Sludge, Inc. v. G. R. Fehr, et al.

plaintiff's (Activated Sludge, Inc.) contentions were completely sustained by the District Courts in each of those cases. The suit of *Activated Sludge, Inc.*, v. *City of Waco, Texas,* was settled prior to its submission to the Circuit Court of Appeals for the Fifth Circuit. The decisions of the District Courts were sustained by the Court of Appeals** in all of the other suits. All of the eight judges who have passed upon the questions sought to be raised by the petitioner in this section of its brief have concurred in conclusions rejecting the petitioner's contentions *in toto.*

Under the stimulating effect of the false statement with respect to suits involving the five patents in suit herein, petitioner has been led to present a further ingenious argument as a part of its stratagem in attempting to convince your Honors that a petition for writ of certiorari should be granted. Petitioner urges that the grounds for granting certiorari in this case are the same which were found to exist in the three cases mentioned in the footnote at page 52 of petitioner's argument, but we have been unable to find any similarity, nor does there exist a situation which would call for the granting of the writ as in those cases. There is no matter of general public importance because the patents in suit have long since expired (1935, 1937) and the petitioner is the only party against whom a suit is pending. One hundred and twenty-four municipalities (Rec. I, pp. 622-627) recognized the validity of the patents in suit and operated under the patents dur-

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** City of Milwaukee v. Activated Sludge, Inc., 69 Fed. 2d 577.
Sewerage Commission of the City of Milwaukee v. Activated Sludge, Inc., 81 Fed. 2d 22.
G. R. Fehr, et al. v. Activated Sludge, Inc., 84 Fed. 2d 948.
Sanitary District of Chicago v. Activated Sludge, Inc. et al, 90 Fed. 2d 727.

ing their term under licenses granted by plaintiff (Activated Sludge, Inc.).

The cases urged by the petitioner in support of its argument clearly set forth the reasons for the granting of the writs on the basis that the patents dominated a substantial portion of the particular industry involved which was so concentrated in one circuit that litigation under the unexpired patents elsewhere was improbable or unlikely. In the cases cited by the petitioner the term for which the patents were granted had not expired, which circumstance does not exist in this case, but which was of primary importance to those industries concentrated in the one circuit. The situation is not at all parallel and the general public importance or interest which moved the court to grant certiorari in those cases does not exist in the present case. Of course, the present case is of importance to plaintiffs as well as defendant but this is not the kind of public importance which is sufficient to warrant the granting of certiorari.

The remarks of Mr. Chief Justice Hughes at the American Law Institute Meeting, as reported in the June, 1934 issue of the American Bar Association Journal are apropos:

> "For example, we have many applications where the questions raised are those relating to particular contracts or transactions and turn upon the facts of the particular case, and there is no controversy of importance with respect to legal principles. Applications are numerous in which there appears to be no conflict of decisions between the Circuit Court of Appeals, or between Federal and State courts in cases where the latter should be controlling, and no real conflict with the decisions of the Supreme Court, and there is an utter absence of any good reason for asking our review. That review, we must emphasize, is in the interest of the law, not in the interest of particular parties. *It is not the importance of the parties or the*

amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered."

We respectfully submit that the grant of certiorari based on petitioner's argument in this section of its brief, or any other section, is utterly without precedent and would be fundamentally unsound.

In Answer to Petitioner's Argument — Point III-A.

The gravamen of the petitioner's argument under this section of its brief is that (p. 53):

> "The four process patents in suit were held valid by the Court below on the erroneous principle that reduction to laboratory practice by scientists was not sufficient to show prior use and that translation of the scientific discovery into commercial success constituted invention upon which to base the granting of a patent."

This means briefly that "the scientists (Fowler et al.)" anticipated Walter Jones, the patentee.

This, of course, is purely a question of fact and has been uniformly decided, contrary to petitioner's assertion, by each of the eight judges who have heard and considered the evidence.

What counsel for the petitioner have done in advancing this argument is to turn to the case of *Corona* v. *Dovan*, 276 U.S. 358, in which case this Court granted a petition for writ of certiorari in view of the conflict of decision between the Second and Third Circuit Courts of Appeal. Counsel find that the Weiss patent was held to be invalid by this Court because one Kratz had, in his laboratory, but several years prior to the date of Weiss' invention, used D.P.G. as an accelerator for the vulcanization of rubber. This was the very thing claimed by Weiss to have constituted his in-

vention. Counsel also find that the plaintiff contended in that suit that the work done by Kratz did not amount to a reduction to practice because it was carried out on a small scale in a laboratory.

The record in the instant case shows that some of the bacteriological phenomena which are involved in the practice of the Activated Sludge process, had been made the subject-matter of some laboratory experiments and tests. These tests and experiments had been conducted by "the scientists", Fowler, Mumford, Ardern, and Lockett. In their over-enthusiasm to find a parallel between this case and that of *Corona* v. *Dovan,* counsel try to make of the instant case simply the question whether the work of Fowler, Mumford, Ardern, and Lockett was on a scale sufficiently large to demonstrate commercial practicability;— whether the work of Fowler, Mumford, Ardern and Lockett involved any commercial use or sale;— whether the paper read by Ardern and Lockett before the Institute of Chemical Engineers constituted a sufficient disclosure, etc., etc.

In order to draw the alleged parallel between the instant case and that of *Corona* v. *Dovan,* counsel for the petitioner have found it necessary to eliminate from their presentation and discussion all of the facts which would at the outset put the present case in an entirely different category from that of *Corona* v. *Dovan.*

The fact of the matter is that "the scientists" were employed by Jones to make the biochemical and bacteriological tests and experiments necessary to demonstrate the effectiveness of the methods and processes which he had conceived and recorded and disclosed to them as a preliminary to all of the laboratory work which they subsequently did,— as a preliminary to all of the laboratory work which is now claimed by the petitioner to have constituted in whole or in part the invention of the Activated Sludge process of the patents in suit.

The fact of the matter is that Walter Jones, who was then the sole proprietor of the firm of Jones & Attwood, gathered together a corps of assistants and collaborators for the very purpose of developing and testing the processes and apparatus which he first conceived of and which now constitute the severally patented ingredients of the Activated Sludge system of sewage purification.

A brief in opposition to a petition for a writ of certiorari does not afford the occasion or the opportunity to marshal and present the evidence of the facts of this matter. A major part of the six-thousand page records in this and the Milwaukee litigation is devoted to this very matter.

For the Court to have some source of accurate information relative to the facts herein, without the necessity of a lengthy restatement of them in this brief, we respectfully refer the Court to the actual "Findings of Fact" entered by the District Court herein. The decree based upon those findings was, of course, affirmed. Those findings are included in the printed record at pages 5046 to 5054, inclusive, which appear in Volume XI of the printed record.

We shall content ourselves, rather, with the quotation of a few excerpts from the opinions of the Seventh Circuit Court of Appeals, showing the complete dissimilarity bebetween the questions involved in this case and those involved in the case of *Corona* v. *Dovan.*

In the first opinion in the suit against the City of Milwaukee, the Court of Appeals summarized the defendant's contentions as follows:

> "As against those claims appellant contended on the trial, (1) that the process claims were invalid because earlier invention must be ascribed, not to Jones and his alleged collaborators at Manchester, England, but to Clark at the Lawrence Experiment Station in Massachusetts in 1912 or 1913, and also to Eddy at

> Worcester, Massachusetts in 1903; and if not, then (2) the invention of the process is not attributable to Jones, but to Fowler, Ardern, Lockett and others without participation by Jones; (3) that the claims with respect to apparatus embody only subject matter which is old in the art." (69 Fed. (2d) 577, 583.)

The Court first disposed of the contentions that Jones and his collaborators had been anticipated by Clark or Eddy, saying in this connection:

> "It is not contended here, however, that Clark or Eddy was the discoverer or inventor of what is now known and practiced as the Activated Sludge process, and the evidence before us falls far short of supporting such a contention if made. Clark's slate depositories did not produce the desired results, nor did the growths of algae, for the reasons already stated, and those processes were abandoned by him. The slate process was also tried by appellant without avail, and it likewise abandoned it. The only manner in which Clark can be said to be identified with what may now be called the perfected process, is the fact that Fowler, a resident of England, visited Clark's laboratory in November, 1912, and observed his work and its results, and from that observation acquired what he, Fowler, termed as an 'illuminating idea.'" (69 Fed. (2d) 577, 583.)

Having thus disposed of the Clark defense and the Eddy defense, the Court of Appeals next took up the question whether the inventions of the patents in suit could properly be patented to Walter Jones, or whether they should have been patented in the names of some one or more of his assistants and collaborators.

A large proportion of the six-thousand page record is devoted to the evidence upon this one question of fact, i. e., whether the inventions were the wholly independent work of Jones' assistants or whether Jones, whose plan was fol-

lowed and who employed, directed, and paid these assistants, and who devised and paid for a vast amount of specially constructed experimental apparatus, could rightfully have signed the patent application papers himself. In introducing the discussion of this question, the Court of Appeals described the relationship of the several parties as follows:

> "The principal question for our consideration, therefore, is whether Jones is the rightful patentee or whether those whom Jones claims to have been his collaborators are in fact the rightful inventors independent of anything which Jones may have done. This necessitates a setting forth of the relationship of those men and their activities during the time in which the patented process was being evolved.
>
> "Jones, a member of the firm of Jones and Attwood, had had a long and successful career in the invention, manufacture and distribution of apparatus for sewage purification. He was also the recognized manager, director and financial support of the syndicate which worked out and exploited the Activated Sludge System. Fowler was a professor in the University of Manchester, England, where he had a private laboratory, and from 1899 to 1904, was superintendent and chemist of the Manchester Corporation Sewage Works, and from 1904 to 1916 was consulting chemist for the Rivers Committee of that corporation. In October, 1913, he first met Jones from whom he accepted employment as consulting chemist, although that fact was not known to the city of Manchester or the Rivers Committee of that city for almost a year afterwards. Mumford was Fowler's personal assistant at the University in 1912 and 1914. Ardern, from 1909 to 1916, was assistant to Fowler as chemist for the Rivers Committee of Manchester, and after 1916 he was either chief or consulting chemist for that committee and a full time employee of the city. Lockett was the research chemist for the Manchester Rivers Committee and a full time employee. In 1906 he was made as-

sistant chemist, and from 1909 to 1915 he was the assistant of Fowler and had actual charge of the experiments carried on in collaboration with Ardern at the Davyhulme Works of the city of Manchester. Coombs in the early part of 1913 was employed by a manufacturing concern near Manchester, and while there he became fully acquainted with what was styled by Mumford as the M-7 process, the letter referring to the first letter of his name and the number to his laboratory culture of that particular aerobic bacillus which he was using in his experiments. Coombs was consulted by Fowler for the purpose of having Coombs' employer supply aeration equipment which was paid for by the city of Manchester and put into operation at the Davyhulme Works between September 20 and 26, 1913. On September 22, 1913, Coombs was employed by Jones and Attwood." (69 Fed. (2d) 577, 583.)

At a later point in its opinion, the Court of Appeals restated the question in more explicit terms, saying:

"There is no doubt that all the bio-chemical experiments, analyses, and tests relating to the subject matter of the patents and leading up to their disclosures, were conducted at Davyhulme or at the University of Manchester. Appellee contends, however, and the trial court found, that Fowler, Ardern, Lockett, Mumford and Coombs were collaborators of Jones who in fact was the discoverer and inventor of the method and apparatus. On the other hand, appellant insists that Jones merely pirated the conception from Fowler, Ardern and Lockett, the real inventors, upon information received by him from Fowler and Coombs who came into his employ during the period of experimentation and from the public disclosures of Ardern and Lockett whom he had never met. Hence, appellant says that Jones was not the inventor and did not believe he was the inventor when he filed his applications for the patents, and was therefore not entitled to them." (69 Fed. (2d) 577, 584).

Upon this issue of fact, the District Court reached a decision in favor of the plaintiff (Activated Sludge, Inc.) and against the defendant. Upon this issue of fact, the Seventh Circuit Court of Appeals reached a decision in favor of the plaintiff (Activated Sludge, Inc.) and against the defendant. Upon this issue of fact, all of the courts in all of the five suits under the Jones patents have reached a decision in favor of plaintiff (Activated Sludge, Inc.) and against the defendant.

The case of *Corona* v. *Dovan* was decided by this Court on April 9, 1928,—prior, even, to the trial of the first of the suits under the Activated Sludge patents, i. e., the suit against the City of Milwaukee. *Corona* v. *Dovan* was cited and urged in that suit and in all of the subsequent litigation, as pertinent to the instant case. The Court of Appeals found, however, that the facts of the present case present wholly different questions from those involved in the case of *Corona* v. *Dovan*. There was not only a very explicit statement by the Court of Appeals of the principles of law upon which the appellant relied, but also an equally explicit statement of the law applicable to the very different facts of the instant case. Thus, in its opinion in the suit against the City of Milwaukee, the Court of Appeals said:

> "We are not at variance with the following principles of law relied upon by appellant:
>
> "A valid patent can be granted only to an actual inventor.
>
> "The application must be made by the original and first inventor, supported by his oath.
>
> "Generally speaking, one is not entitled to patent the discovery or invention of his employee.
>
> "When a number of persons make an invention jointly, a valid patent cannot be taken out in the name of one of them. But when a person has discovered an

> improved principle and employs other persons to assist him in carrying it out, and they in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvments are in general to be regarded as the property of the party who discovered the original improved principle, and may be embodied in his patent as a part of his invention. *Agawam Woolen Company* v. *Jordan*, 7 Wall. (74 U. S.) 583, 19 L. ed. 177; *Larson* v. *Crowther* (C. C. A.), 26 F. (2d) 780." (69 Fed. (2d) 577, 587.)

The first opinion of the Seventh Circuit Court of Appeals covers some twenty double-column pages in Volume 69 of the Federal Reporter, Second Series. We shall refrain from quoting more fully from it. Our sole purpose in quoting the above excerpts is to show that the real question in the present case was the purely factual question of whether "the scientists", Fowler, Mumford, Ardern, and Lockett, were the assistants and collaborators of Jones, employed and paid by him for contributing their skill in testing and demonstrating Jones' ideas, or whether they were sole and independent inventors of the subject-matter of the patents in suit.

This is a vastly different question from that involved in the case of *Corona* v. *Dovan*, in which Kratz had never had any connection of any kind with the patentee, Weiss, and in which anything and everything which Kratz had done was wholly independent of Weiss and without even a knowledge of Weiss' existence.

We do not propose in this brief in opposition to the petition for a writ of certiorari to argue the real question which was presented to all of the lower courts in this case and in all of the previous cases under the patents in suit. We content ourselves with the simple assertion that the

facts of *Corona* v. *Dovan* have no parallelism with the facts of the present case; with the simple assertion that the questions which were involved in *Corona* v. *Dovan* are not the questions which have been involved or can be involved in the present case; and with the simple assertion that the decisions of the Seventh Circuit Court of Appeals, relative to which three petitions for writ of certiorari to this Court have been filed and denied, involved questions of pure fact to which the defendant's petitions have not even alluded.

In Answer to Petitioner's Argument — Point III-B.

Petitioner contends that the Court of Appeals herein, in arriving at its decision, treated the patents collectively and did not consider individually each of the patents in suit. Petitioner asserts, therefore, that the present decision is in conflict with the decision of this Court in *Altoona Theatres* v. *Tri-Ergon Corp.*, 294 U. S. 477. Such an assertion by petitioner must necessarily be based wholly upon opinion, for of course petitioner can have no knowledge or record of the thought processes indulged in by the judges of the Seventh Circuit Court of Appeals in arriving at that decision. The members of that Court, however, did not have to resort to opinion or guess as to that matter. In its opinion herein, the Seventh Circuit Court of Appeals, with respect to this contention, said (90 F. (2d) 727, 730):

> "Appellant with considerable emphasis challenges the correctness of our opinion in the first Milwaukee case. This contention is based on the ruling in *Altoona Theatres* v. *American Tri-Ergon Corporation*, 294 U. S. 477, 55 S. Ct. 455, 79 L. Ed. 1005, wherein the well-known rule is reiterated that each claim of a patent constitutes a separate grant of monopoly, and each must be considered by itself both with respect to validity and infringement. This, appellant says, we did not do, but that on the contrary

we treated all the claims of all the patents, both process and apparatus, as constituting one method patent. We had no intention of doing so, and we think we did not, nor did we assign reasons for not considering the claims separately in the sense which appellant contends.

"A study of this record and the arguments of counsel convinces us that our conclusions as set forth in our opinions in the Milwaukee cases, both with respect to validity and infringement, are sound. For the reasons therein stated we hold that the District Court in this case properly held that each of the claims here in issue is valid."

What counsel for the petitioner have done in presenting their argument on this alleged error of the courts below is to take the case of *Altoona* v. *Tri-Ergon*, in which the Vogt, et al., patent was held to be invalid upon the ground that it did not claim the invention which the Third Circuit Court of Appeals had attributed to Vogt, et al. They have seized particularly upon a paragraph containing a sentence in which the opinion of this Court, by Mr. Justice Stone, had said that "The patent thus upheld is one which was neither claimed nor granted." Counsel have endeavored then to contort the facts of the present case into alignment with those of the Tri-Ergon case, as they have done twice before in presenting the same argument to this Court in support of petitions for writs of certiorari.

In its opinion, the Seventh Circuit Court of Appeals outlined the state of the art relative to the purification of sewage, and then said, at page 582 of Volume 69 of the Federal Reporter, Second Series:

"With this general statement of the earlier attempts at purification of sewage and of the knowledge of bacterial characteristics and their activities with respect to such purification, we shall proceed to describe the method which appellee claims was disclosed for the

first time by the Jones patents, *and which it is admitted by both parties was invention, and of revolutionary benefit to mankind.*"*

Then follows a single paragraph in which the Court summarized the disclosures of the several patents which were involved in suit.

Counsel not only contort the facts of the present case in an attempt to convince this Court that the ruling of the *Tri-Ergon* case is applicable, but counsel further resort to the expediency of quoting a selected sentence (p. 61) from a finding of the District Court which is grasped at in desperation in this third attempt to have your Honors review these patents on the questions involving anticipation and invention. The complete finding from which counsel finds it convenient to extract a single sentence reads in full as follows (R. XI, p. 5052):

> "Patents #1,247,540, #1,282,587, #1,247,542, #Re. 15, 140 and #1,286,017 and their British antecedents form parts of a continuous effort in the development of methods and apparatus with respect to the Activated Sludge process which kept pace with the bio-chemical discoveries. All of these patents have a very close relationship in the act and should, the Court of Appeals found, be considered collectively. It is unnecessary to determine exactly all points of contact or of overlapping of one as against another."

It is clearly apparent that the collective consideration given to the enumerated patents has to do with the "act" in the development of the methods and apparatus involved in

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* As was explicity pointed out in the brief in opposition to a former petition for writ of certiorari "the petitioner has expressly admitted that the patents in suit disclosed inventions of an 'important,' 'revolutionary', and 'remarkable' character. (Milwaukee record, pp. 2517, 2519, 2523, etc.)."

the patents and not to the claims as counsel would like to have appear. This demonstrates the far-fetched contorted argument and the length to which petitioner is willing to go in its attempt to have these questions of anticipation and invention considered by this Court.

All of these patents related to the same general subject matter. They disclosed a succession of inventions, all relating to this same general subject. All of the inventions claimed in the several patents could be used conjointly, and were alleged to have been used conjointly by the defendant.

It is solely and only because the Court of Appeals (Milwaukee litigation) found it convenient to contrast the sum total of the conjoint use of all of the Jones patents with all that had been done or known in the previous art of sewage purification, that counsel for petitioner have found an alleged valid excuse on which to assert that the Court of Appeals constructed and then validated a synthetic patent which had neither been asked nor granted.

In so doing, counsel for the petitioner completely disregard the patent by patent and claim by claim discussion in the opinion of the Court of Appeals.

As we have previously pointed out, the Seventh Circuit Court of Appeals has, itself, in its opinion in the present suit, sufficiently answered and refuted the contention of petitioner's counsel.

In Answer to Petitioner's Argument — Point III-C.

Petitioner now requests your Honors to cast and sweep aside all of the painstaking, careful and considered review of the thousands of pages of testimony and examination of hundreds of exhibits by the courts below during the last twenty-two years of litigation, and without reviewing or weighing the factual controversies, hold that the claims of the Jones patents are invalid on their face. Counsel

invite this Court to hold such claims invalid without even "perusing the opinions of the courts below."

In petitioner's build-up of this thesis leading to an alleged parallel between the claims of the Jones patents and the claims considered by this Court in the *Halliburton Oil Well Cementing Co* (91 L. ed 15; 67 Sup. Ct. 6), *General Electric Co.* (304 U. S. 364), and *United Carbon Company* (317 U. S. 228) cases, counsel for petitioner refute their own contentions with respect to the claim seized upon for presentation to your Honors. Petitioner's assumptions and presumptions that the claims are invalid on their face and the question "Where can invention be found in such claim?" have been argued, reargued, reviewed and again reviewed, starting with the Milwaukee litigation during the twenty-two years of litigation, and the eight judges before whom these cases were argued have held contrary to petitioner's contention and have sustained the validity of the claims in issue.

If the "means" for introducing air in the combination recited is old, as admitted by petitioner, how can such means at the same time constitute the "most crucial element" or the essence of the invention? To argue such a proposition is an absurdity, yet an appeal is made to your Honors on that predicate. The fallacy of such an argument is apparent and it will be obvious that to state the premise is to immediately exclude the claims considered by the petitioner from the rule of the cases above identified.

To our knowledge this Court has never denied the right of a patentee to structurally describe the physical and operating relationship of the operating parts of a novel combination in terms of "means" where there was an adequate description of the invention in the claim, and as a matter of fact, such procedure was approved of by this

Court in the *Halliburton* case by reference to Claim 2 involved in the case of *Continental Paper Bag Company* v. *Eastern Paper Bag Company*, 210 U. S. 405.

The case of *General Electric Co.* v. *Wabash Appliance Corp. et al.*, 304 U. S. 364, cited by petitioner to support its argument, stated at pages 371 and 372:

> "* * * But the vice of a functional claim exists not only when a claim is 'wholly' functional, if that is ever true, but also when the inventor is painstaking when he recites what has already been seen, and then uses conveniently functional language at the exact point of novelty.
>
> "A limited use of terms of effect or result, which accurately define the essential qualities of a product to one skilled in the art, may in some instances be permissible and even desirable, but a characteristic essential to novelty may not be distinguished from the old art solely by its tendency to remedy the problems in the art met by the patent."

As will be apparent, petitioner admits that the term "means" was not used by Jones in his patents at the very point of novelty.

What counsel for petitioner have done in their argument is to take the cases of *Halliburton Oil Cementing Co.* v. *Walker*, 91 L. ed. 15, 17, 67 Sup. Ct. 6; *General Electric Co.* v. *Wabash Corp.*, 304 U. S. 364, 371; and *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, in which claims were held to be invalid for indefiniteness and have endeavored by ingenious and subtle, but incongruous argument to contort the facts of the present case into alignment with the cases referred to.

The inconsistent and contradictory substance of petitioner's argument is apparent on its face. Petitioner refers to certain of the claims of one of the patents in suit which have been consistently held valid by the lower courts and says (p. 62):

"Aeration of sewage is admittedly an old principle and requires some kind of means for the introduction of air or oxygen into the sewage."

Petitioner then states (p. 62):

"However, simply to claim 'means for introducing air or oxygen at the lower part of the tank' adds nothing to the prior art."

Petitioner then says (p. 65):

"If any invention may be found in the apparatus patent involved in this suit, it must be found in the means for the introduction of air or oxygen into the raw sewage."

Petitioner then attempts to submerge and obliterate these contradictory, illogical and irrational statements by one touch of the wand by referring to certain decisions of this Court in an attempt to consummate and accomplish its legerdemain and spread its "bag of tricks" before this Court in order that it may secure a rehearing on the same grounds as presented in its previous petitions for writs of certiorari denied by this Court. Thus, petitioner states the well known rule of this Court having no application to this case:

"When the term 'means' accompanied by a functional statement is used to designate an element or part of a claim which constitutes the essence of the invention, it will be regarded as functional and the claim is void:—"

On the basis of such contrary and incongruous premises and conclusions, petitioner's counsel, as was done in both the Milwaukee case and this case, attempt to impress this Court with a concocted argument to suit their own fancy, to the effect that the courts below were in error in holding the claims of the patents in suit valid.

A necessary and integral part of petitioner's argument

is premised and predicated upon assorted defenses repeatedly rejected by the lower courts which counsel again advance as a medium to support their position respecting the invalidity of the Jones patents.

Petitioner says (p. 64) that:

> "The provisional specification in the British patent, on which the apparatus patent in suit is based * * *"

and that (p. 65):

> "The original American application contained similar language but Jones solicitor, for reasons unknown, later broadened the claims to their present form."

The controverted issues of fact are whether the Jones patents in suit were properly based on some one or more British patents and whether the prosecution of the Jones applications was in accordance with the practice promulgated by the United States Patent Office. These factual issues were resolved by the lower courts against this petitioner and other defendants and in favor of respondents.

It is well settled that if an application for a patent is filed in the United States, in which the invention is disclosed by drawings or description, or both, but not claimed, the inventor is permitted to amend the specification to conform with the drawings, amend the drawings to conform to the specification, and to insert claims to all of the originally disclosed subject matter. In such cases a supplemental oath is usually filed. The filing of a United States patent application containing the usual oath and claiming subject matter disclosed but not claimed in one or more prior British applications upon which the United States application is based, is the complete equivalent of the filing of a supplemental oath in a United States application which, when filed, disclosed but did not claim subject matter covered by the supplemental oath.

Whether the patents which petitioner has asked review of by this Court are properly based upon some one or more British patents, or whether or not any or all of the patents in suit would be valid even though not based upon some one or more British patents are questions to be determined by the facts in each instance.

In order to determine the validity of the argument now presented by petitioner, it would be necessary for this Court to review the facts from the thousands of pages of evidence to determine whether or not any or all of the patents in suit have to depend for validity upon the filing date, disclosure and/or claimed subject matter of some one or more British patents, and then further to review the facts to determine whether or not the British patents as filed, or as amended, constitute a sufficient basis for the United States patents as filed, or as eventually issued. In addition, a still further review would have to be made to determine whether the United States patents to Jones were prosecuted in accordance with the rules of the United States Patent Office.

While petitioner conveniently avoids "spot-lighting" the actualities of the situation in that regard, the validity of petitioner's argument, based on what were controversial issues of importance in the litigations involving the Jones patents, could be resolved by this Court only by the tremendously involved review of factual data outlined above.

It is, therefore, apparent that the plausibility of petitioner's argument loses its significance in the light of the *assumed* facts which, while urged by petitioner and other defendants in the courts below, have been found in each instance to be erroneous. In order that this Court might arrive at a conclusion that the Court of Appeals was wrong in its findings of fact upon which it held that the United States patents in suit are valid, it would be necessary for

this Court to review and understand the factual controversies resolved by the courts below against petitioner and in favor of respondent.

It is our understanding from this Court's opinions in the case of *United States* v. *Johnston*, 268 U. S. 220, that a petition for writ of certiorari will not be granted to review evidence and discuss specific facts.

Regarding the granting of writs of certiorari, this Court, in *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178, said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. *Southern Power Co.* v. *N. C. Public Service Co.*, 263 U. S. 508; *United States* v. *Johnston*, 268 U. S. 220, 227. Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14. *United States* v. *McGowan*, 290 U. S. 592. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464. There is evidence to support them. Nor would the writ be granted to review the questions of anticipation and invention that petitioner argues, for as to them there is no conflict between decisions of circuit courts of appeals."

Furthermore, as the Supreme Court has so often said:

> "Such an ordinary patent case, with the usual issues of invention, breadth of claims, and non-infringement, this court will not bring here by certiorari unless it be necessary to reconcile decisions of circuit courts of appeal on the same patent." *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, 319.

CONCLUSION.

It seems obvious that parties ought not to be permitted indefinitely to litigate issues thoroughly tried and adjudicated. Plaintiff (Activated Sludge, Inc.) came to the lower courts with a clean, wholesome cause of action, based upon United States patents, whereby the Government had conferred upon the patentee, as a meritorious and pioneer inventor, a lawful monopoly by way of approval and as a reward for the exercise of his inventive genius. All of the factual issues have been decided adversely to petitioner. We respectfully submit that the present case is an ordinary patent case in which the usual factual issues have been concurrently decided by the lower courts in favor of respondents and adversely to petitioner, and that it does not present any of the special circumstances which would justify this Court in the grant of the petition.

We respectfully submit that the petition for certiorari should be denied.

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